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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1672

T. W. GUTHRIE, et al.,
Petitioners,

versus

ALABAMA BY-PRODUCTS COMPANY, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

BRIEF

In Opposition on Behalf of Respondents, Alabama By-Products Corporation, McWane Cast Iron Pipe Company, Hayes International Corporation, Chicago Bridge & Iron Company, Woodward Corporation, Southern Natural Gas Company

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Respondents, Alabama By-Products Corporation, McWane Cast Iron Pipe Company, Hayes International Corporation, Chicago Bridge & Iron Company, Woodward Corporation and Southern Natural Gas Company (hereinafter "Respondents"), oppose the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this cause. The per curiam opinion of the Court of Appeals is reported at 456 F.2d 1294

and included in petitioners' brief at pages A-5 and A-6. The Court of Appeals expressly affirmed the case on the basis of the district court's opinion, reported at 328 F. Supp. 1140 and contained in petitioners' brief at pages A-7 through A-21.

QUESTION PRESENTED FOR REVIEW

Respondents cannot agree with the statement in petitioners' brief of the questions presented for review. Respondents state that the single issue presented by this petition is whether the courts below correctly held in an action brought by riparian landowners for injuries to their property rights that 33 U.S.C. §407 does not create a federal right of action and present a basis for federal question jurisdiction.

STATEMENT OF THE CASE

Petitioners' brief misstates the holdings of the lower courts and attempts to broaden the questions presented to this Court. The district court's holding, and Court of Appeal's affirmance, of no federal question jurisdiction was based upon decision of the narrowly defined question and the limited issue of whether private riparian landowners had a federally created right of action under 33 U.S.C. §407 (section 13 of the Rivers and Harbors Appropriation Act of 1899) for property damage not related to anchorage or navigation. The district court's opinion explicitly states this limited holding:

> A careful review of the Rivers and Harbors Appropriation Act of 1899, its legislative history, its administrative interpretation and its judicial gloss has convinced this court that 33 U.S.C.A. § 407 was not enacted for the purpose or with the effect of creating a federal cause of action to protect riparian landowners from the kinds of water pollution that have traditionally been dealt with under the law of nuisance.
>
> 328 F.Supp. at 1145;
> (A-13 Petitioners' Brief).

Petitioners' statement (p. 5 of Brief) that both lower courts have held that Section 13 applies only to discharge of refuse that interferes with navigation confuses the issue before this Court and misstates the district court's decision. In fact the district court held that:

> [A]lthough Section 407 may create a federally protected right against deposit of refuse which injures navigation or anchorage, the injury of other private rights, even **from deposits in violation of Section 407**, does not give rise to a federal right of

action nor does it supply a basis of federal jurisdiction in this case (emphasis added).

328 F.Supp. at 1148;
(A-19 Petitioners' Brief).

The limited holding and scope of the decisions of the courts below is clear and petitioners' attempt to expand or confuse such decisions becomes apparent upon a careful reading of the opinions.

REASONS FOR REFUSING WRIT OF CERTIORARI

1. No Important Question of Federal Law

Petitioners argue that this case presents an important question of federal law by referring to the growing concern of the courts for environmental and ecological problems. The decision of the courts below does not evidence a lack of concern for these problems but merely recognizes that petitioners have a forum for their complaints—the state courts—which forum has traditionally dealt with the questions presented by petitioners' complaint. It is clear from a reading of the decision of the district court that it recognized the growing ecological concerns (see A-20 Petitioners' Brief) but likewise recognized that there existed no legitimate basis or need to expand the existing federal law to allow jurisdiction of petitioners' common law claims.

Moreover, there is absolutely no basis for petitioners' claim that the decisions below in any manner effect the Justice Department's use of the Refuse Act as a tool in its pollution abatement program.

This case does not unsettle any important federal law nor does it interfere with federal pollution activities.

2. **No Conflict With Applicable Decisions of This Court**

All of the cases cited and arguments made by petitioners regarding a conflict with decisions of this Court were presented to both of the courts below and rejected. The district court's opinion fully answers the arguments raised in this regard and respondents rely on the opinion and will not burden this Court with repetition of well recognized principles of federal jurisdiction and private implied civil action concepts.

3. **No Conflict With Decisions of Other Courts of Appeal**

The same comment made above applies to petitioners' arguments and authorities made in support of their theory that the decisions here are in conflict with those of other Courts of Appeal. It is interesting to note that petitioners, although arguing that the lower courts here have ignored the recent awareness of environmental problems, fail to cite **any** recent case of any other Court of Appeals dealing with environmental problems which they claim these decisions to be in conflict with.

ARGUMENT

Title 33 U.S.C. § 407 Does Not Create a Private Cause of Action for Injury Caused Riparian Landowners Not Related to Navigation

The legislative history and administrative interpretation of the 1899 Act clearly supports the lower courts' determination that no private right of action should be implied in the absence of an obstruction or impediment to navigation. This determination does not include the meaning which petitioners attempt to ascribe to it in their argument (Brief pp. 8-14) that the courts below read into the statutory prohibition a requirement that for a violation of § 407 to occur navigation must be injured. The district court's holding was that the intent of the statute was to protect navigation and this intent was important in determining what kind of civil remedy should be implied. Petitioners, in asking the courts below to imply a civil remedy, conceded that the remedy sought was not expressed in the statute but argued it should be implied. The district court examined the legislative history to determine the intent of the legislation and whether the petitioners were to be afforded implied civil relief under the penal statute involved. The legislative history was not examined to determine what the act prohibited but rather was looked to for determining the purpose of Congress in prohibiting the activity to ascertain whether Congress intended the kind of relief petitioners were seeking and whether the statute was to protect the rights they were seeking to enforce. Both lower courts determined after extensive briefing and oral arguments that petitioners were not within the class intended to be protected by the statute and the injuries complained of were not related to the interest sought to be protected.

The decisions below recognize a federally protected private right of action under § 407 for injuries to navigation or anchorage. The courts below also recognized that the penal provisions of § 407 could be enforced by the responsible government officials whether or not violations of that section interfered with navigation or anchorage. There is absolutely no basis for petitioners' arguments that the courts below have given § 407 a narrow and cramped reading or that the construction given this section conflicts with the enforcement procedures of the United States government.

In addition to the legislative history and administrative interpretation, a close examination of the statute itself and its judicial construction led the courts below to the conclusion that it does not provide petitioners with a federally protected right to seek recovery for damages caused by industrial discharges which have no effect on navigation.

The district court, while recognizing the implication of a civil remedy for violations of penal statutes as a sound principle of law, held that the two requisites for its invocation were not met in this case: (1) petitioners were not within the class of persons for whose special benefit the statute was enacted and (2) section 407 was not enacted for the purpose of protecting against the type of injury alleged by petitioners. **Wyandotte Transportation Co. v. United States**, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967); **H. Christiansen & Sons, Inc. v. City of Duluth**, 154 F.2d 205 (8th Cir. 1946); **Chambers-Liberty Counties Nav. Dist. v. Parker Bros. & Co.**, 263 F. Supp. 602 (S.D. Tex. 1967). The district court explicitly recognized that numerous judicial decisions have held that violation of the penal provisions of the 1899 Act with resulting injury to rights of navigation or anchorage can be a basis of a federal right of action. See, e.g., **Acme Boat Rentals, Inc.**

v. J. Ray McDermott & Co., 424 F.2d 393 (5th Cir. 1970) and cases cited in footnote 17 of district court's opinion (p. A-15 Petitioners' Brief).

Not only do petitioners fail to come within the general rule regarding implied civil actions, no court, of which respondents are aware, has implied a civil remedy under § 407 in favor of parties in a position similar to petitioners. The only other decision directly dealing with this issue is **Lavagnino v. Porto-Mix Concrete, Inc.**, 330 F. Supp. 323 (D. Colo. 1971), which held as did the lower courts here, that it did not have jurisdiction of a claim which dealt with property damage but did not involve damage to or effect on navigation. See also, **Hooper v. United States**, 331 F. Supp. 1056 (D. Conn. 1971).

All of the cases cited by petitioners relative to federal question jurisdiction—(pp. 20-25 Petitioners' Brief)—were cited to the courts below and respondents submit that the district court's opinion fully answers the petitioners' argument in this regard. Petitioners' cause of action in no way depends on the existence or construction of § 407. Reliance on federal law sufficient for federal jurisdiction must be direct and not remote. **Bell v. Hood**, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946); **Gully v. First National Bank**, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); **Johnston v. Byrd**, 354 F.2d 982 (5th Cir. 1965). In this case the petitioners' claim is founded not upon federal law but upon common law torts of negligence and nuisance. Section 407 is irrelevant and wholly tangential to petitioners' claims thus there is no claim founded directly upon federal law. At most the statute may establish a standard of care by which to evaluate the activities of respondents but the validity of the statute or its construction is not involved. Section 407 is not an element, especially not an essential one, of petitioners' cause of action.

CONCLUSION

Respondents submit that the petition for a writ of certiorari should be denied. None of the basic reasons for granting such a writ are involved herein—no important question of federal law is involved andl no conflict exists between this decision and the decisions of other Courts of Appeal or this Court.

All of the arguments and authorities presented by petitioners here were presented and carefullly analyzed by the courts below. The district court and the Court of Appeals for the Fifth Circuit concluded that no basis exists for implying a civil remedy under the circumstances of this case and no need exists to expand the present federal law to allow jurisdiction of these commom law claims. Although the federal judiciary has, in the main, expanded concepts and liberally construed federal statutes when compelled to do so by a pressing and legitimate need such a case is not presented here. These petitioners have not, in seeking redress of some legitimate injury turned to the federal courts as a last resort, after being denied relief elsewhere, but have attempted to open the federal door

first, with full realization that a state forum is available which will recognize the common law rights involved.

Respectfully submitted

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